Filed 11/16/12 In re E.T. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.T. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.T., Defendant and Appellant.	E055071 (Super.Ct.Nos. J239955, J239956 & J239957) OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

C.T., defendant and appellant (hereafter father), appeals from the trial court's October 27, 2011, disposition orders on amended Welfare and Institutions Code section 300 petitions filed with respect to his three daughters, C.T. (16 years old), V.H. (8 years old), and E.T. (3 years old).[1] At the conclusion of the combined jurisdiction and disposition hearing on all three petitions, the trial court found various jurisdiction allegations to be true, including the allegation under Welfare and Institutions Code section 300, subdivisions (d) and (j),[2] respectively, that father had sexually abused then seven-year-old V.H., and as a result both C.T. and E.T. were at risk. The trial court then denied reunification services to father with respect to all three girls. In this appeal, father contends the trial court's jurisdiction findings are not supported by substantial evidence, and he also challenges the disposition order denying him reunification services with respect to C.T.

We conclude, as we explain below, that substantial evidence supports the trial court's jurisdiction findings and that father failed to demonstrate reunification with C.T. is in the child's best interest. Therefore, we will affirm the disposition order.

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[1] Father is the biological father of both C.T. and E.T., and the presumed father of V.H.

[2] All further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are not in dispute. San Bernardino County Children and Family Services (CFS) filed section 300 petitions in July 2011 with respect to E.T., C.T. and V.H. after V.H. told her older brother that her father had touched her privates. V.H. made the disclosure in response to questioning by her brother and his girlfriend, after V.H. (who was seven years old at the time) put her hands in the panties of her brother and his girlfriend's daughter and then tried to kiss the child. When the brother's girlfriend questioned V.H. about her behavior, she said that father had "'touched her privates.'" V.H. repeated that statement to a Barstow police officer.[3] When questioned by a responding social worker, V.H. said that when she lived with father in Hollywood, he rubbed her privates over her clothes. V.H. demonstrated by pointing her index finger and rubbing it back and forth on a table.

CFS placed all three children in foster care. At the detention hearing, the trial court found a prima facie showing of abuse and risk with respect to all three children. According to the pertinent social worker's reports, six weeks after the initial abuse report, a nurse practitioner at the Children's Assessment Center (CAC) examined V.H. During

[3] Father had called the police after he came home drunk and got into a fight with the brother about the brother and his family overstaying their welcome in father's home and eating up all father's food. The brother apparently reported V.H.'s sex abuse allegation when the police responded to father's call. Father had been the primary caretaker, and had just obtained legal custody of the three girls on July 15, 2011, when the then-pending dependency case was dismissed. The girl's mother has a history of neglecting and exploiting her children, who include the three girls in this matter, as well as the brother, and an older daughter, J., who claimed her mother sold her to men for sex.

that interview, V.H. said that father "told her 'to bend over and not tell anyone.' She said that she told her brother [ ] but that she was scared to tell because [father] said he would 'whoop her.' [V.H.] explained that one night, [C.T.] and [E.T.] were upstairs and she asked [father] if she should go to bed. She stated that [father] told her 'No' and then told her to 'take her pants down' while sitting together in the living room." "[V.H.] said that at that time [father] 'was checking her boo-boo,' which she also calls her 'butt.' She said that he was the one to take her clothes off and then spread her butt cheeks with his hand and touched her 'boo-boo.' She said, 'He pulled my pants down' and said that he took her panties down, too. She said that after he 'checked' [her] he told her to pull her pants up and go to bed. [V.H.] clarified that this happened in Los Angeles when she was seven (7) years old. She said that [father] touched her 'pee-pee,' which she calls her vagina, on two occasions. She said that [father] would tell her to take her clothes off and would use his fingers to open her 'pee-pee.' She said that sometimes it would burn when she peed, but only after 'someone' had touched her 'pee-pee.' [V.H.] clarified that [father] is the only one that has touched her 'pee-pee' or 'boo-boo.' She said sometimes her 'boo-boo' bleeds when she goes to the bathroom."

The nurse practitioner reported that her physical examination of V.H. disclosed the child's hymen was "almost completely diminished" with "ragged edges with keyhole appearance." In her written report, the nurse practitioner checked the box that states "Sexual abuse is highly suspected," and also underlined the word "highly." In her further PSC report, the social worker reported that she spoke with the nurse practitioner who said

"that sexual abuse was highly suspected as a result of the abnormal exam with the hymen almost completely diminished. She stated that the hymen usually covers the inter-vaginal walls, but in [V.H.'s] case the walls were exposed. These abnormal findings and the child's demeanor of being guarded and stating that someone hurt her privates lead the nurse practitioner to believe sexual abuse was highly likely. [The nurse practitioner] stated that, 'these markedly abnormal findings are unusual even in abuse cases.' She explained that the trauma to [V.H.'s] internal area indicated definite vaginal penetration but the trauma was not acute and therefore had occurred at least two weeks prior to the exam."[4]

When father was interviewed, first by the Barstow police officer who responded to the domestic disturbance call, and later by a social worker, he denied that he had sexually abused V.H. When told the results of V.H.'s forensic medical examination, father said V.H. had a medical exam a year earlier that showed sexual trauma. Father said the injury was probably the same one that doctor had identified, and that V.H. "came that way," i.e., with the damaged hymen, to his house. Father "explained that [V.H.] 'tells stories' and that he wanted to get the kids away from their mother and her family, since that side of the family has a history of sex crimes and [C.T.] once told him that her mother was trying to sell her for sex."

[4] A forensic examination of E.T., the youngest child, revealed labial adhesions, but given the child's young age, it was difficult to determine whether the findings were the result of abuse.

Father, the social worker, the girls' previous foster mother, and C.T. all testified at the contested jurisdiction and disposition hearing. The foster mother testified in pertinent part that in July 2010, V.H. told her that V.H.'s mother stuck her finger in V.H.'s vagina and had touched her private parts. V.H. also told the previous foster mother that father had sex with C.T. The foster mother did not question C.T., but did report V.H.'s statement to the social worker. C.T. never expressed fear or any information that indicated father had abused her. In their testimony, both C.T. and father denied V.H.'s claim that father had sexually abused C.T.

In his testimony, father acknowledged that he had gotten drunk on the night in question and told the brother to leave. When the brother did not go, father called 911.[5] Father had to call 911 again because the brother was outside "running his mouth." After the second call, the brother was outside when father heard him say, "'My little sister said that you've been touching her.'" Father responded, "'I don't care. Get out of here.'" Father acknowledged that a year earlier, while living in Compton, V.H. had "exhibited some sexually acting out behaviors" with other little kids. Initially father viewed the behavior as "kid stuff," but then "other people have came and told [him]." So then father "addressed it a couple of times saying, you know, this is not good." Father also confirmed that V.H. made up her claim that he sexually abused her, but he

[5] Father also apparently woke 16-year-old C.T. and told her to leave the house because she had taken the brother's side in the argument.

acknowledged, based on what he had been told by the social worker, that someone had sexually abused V.H.

The social worker testified at the hearing that she based her conclusion that father had sexually abused V.H. on the forensic interview in which V.H. disclosed sexual abuse by father and on the medical exam. The social worker confirmed that V.H. had previously claimed to have been sexually abused, but those claims did not involve father. In July 2010, the mother was investigated for possible sexual abuse of V.H.; the claim was unfounded, and V.H. eventually denied any sexual abuse by mother. The social worker acknowledged that the only physical examination of V.H. occurred in connection with V.H.'s current claim of sex abuse by father. The social worker expressed the view that father, rather than V.H.'s mother, was the abuser because V.H. had made the report to "multiple people and has remained consistent with that since her disclosure in July of 2011."

After lengthy argument by counsel for the various parties, the trial court found that all three children came within its jurisdiction and that V.H. had suffered severe sexual abuse. Accordingly, the trial court denied reunification services to father with respect to all three girls.

Additional facts will be recounted below as pertinent to the issues father raises on appeal.

DISCUSSION

Father challenges the sufficiency of the evidence to support the trial court's various findings at the combined jurisdiction and disposition hearing. We first address his assertion that the evidence is insufficient to support the trial court's jurisdiction findings under section 300, subdivisions (d) and (j) that father had sexually abused V.H., and as a result both E.T. and C.T. are at risk.

1.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT JURISDICTION FINDINGS

With respect to V.H., the trial court found the allegations under section 300, subdivisions (a), (b), (d) and (g) true. The section 300, subdivision (d) allegation is based on father's alleged sexual abuse as substantiated by the CAC exam on August 15, 2011. With respect to C.T. and E.T., the trial court found true the allegations under section 300, subdivisions (b) and (j). The section 300, subdivision (b) allegation with respect to all three girls is based on father's abuse of alcohol as a result of which the girls are at substantial risk of harm because the problem interferes with his ability to provide for the children. The section 300, subdivision (j) allegation with respect to E.T. and C.T. is based on father's alleged sexual abuse of V.H. as a result of which the other two girls are alleged to be at risk of sexual abuse.

Father contends that V.H.'s statements that he sexually abused her contradict statements she had made in the past and therefore all her statements are unreliable. In addition, father argues because there is no evidence to show father committed any act that

involved penetration of the child's vagina, the evidence that V.H.'s hymen is diminished cannot be connected to father and therefore does not corroborate V.H.'s claims. Consequently, father contends the trial court's jurisdiction finding with respect to V.H. is not supported by substantial evidence because it is based entirely on V.H.'s unreliable and contradictory statements. In other words, father contends V.H. is unreliable as a matter of law.

Although we do not share father's view, even if we did, we would affirm the trial court's decision because, as noted above, the trial court made jurisdiction findings on several allegations in the respective dependency petitions, including the section 300, subdivision (b) allegation that as a result of father's abuse of alcohol he is unable to care for the girls which in turn creates a substantial risk they each will suffer harm. Father does not challenge the sufficiency of the evidence to support the jurisdiction findings under section 300, subdivision (b). Therefore, even if we were to agree the evidence does not support the section 300, subdivision (d) allegation with respect to V.H., or the section 300, subdivision (j) allegations with respect to E.T. and C.T., we nevertheless would affirm the trial court's jurisdiction findings with respect to all three girls.

Because father's challenge to the trial court's disposition orders is based in part on his claim that the sex abuse allegation is not supported by substantial evidence, we will address his sufficiency of the evidence claim with respect to V.H.

A. Standard of Review

We review a trial court's jurisdiction and disposition findings under the substantial evidence standard which requires us to "review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court's conclusions. 'All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.' [Citation.]" (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649, 1654.) "The term 'substantial evidence' means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value. [Citation.]" (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.)

B. Analysis

Father contends the forensic evidence does not corroborate V.H.'s claim that he sexually abused her, and she in effect is unreliable as a matter of law. As father points out, V.H. claimed in 2010 that father had sexually abused her but then later said her mother, not father, put her hand down V.H.'s panties and inserted a finger in her vagina while V.H. was in bed. Father also notes that V.H.'s current reports of abuse by him are inconsistent, that her demeanor when interviewed by the social worker suggested she was not being truthful, and details of the abuse changed with each retelling. In particular, V.H. reported first to her brother and/or the brother's girlfriend and then to a police officer that father rubbed her vaginal area outside her clothing, and that it happened twice, the most recent time was two days earlier. V.H. gave the police officer the

additional detail that it happened once in Barstow and once in Compton. Father notes that two days later, V.H. told a social worker that father rubbed her privates over her clothes and that it happened in Hollywood. When the social worker asked if that meant it happened while she lived at Greta's, V.H. said yes. When the social worker asked "if daddy ever touched her privates at their house in Barstow," V.H. said, "No." V.H. did not know where she was in Greta's house when father touched her, or how many times the touching took place. In addition, V.H. looked at the floor while talking with the social worker, and grinned when the social worker asked V.H. to please look at her while talking. V.H. also smiled when she confirmed that she was mad at father. Father also challenges the credibility of the statements V.H. made during the CAC forensic interview. As previously recounted, in that interview V.H. reported for the first time, that father had once removed her clothing and used his hand to "check" her butt,[6] and twice he used his fingers to open her vagina apparently after telling her to take her clothes off.

To reject her testimony, we must be able to conclude, as a matter of law, that V.H. is not credible as a witness. We cannot reach that conclusion in this case. We recognize the trial court initially was troubled by the absence of any statement by V.H. or other evidence to show father committed any act that would explain the damage to V.H.'s hymen. The mother's attorney argued that the court could infer such an act from V.H.'s claim, recounted above, that father had touched both her vagina and her butt, or anus.

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[6] Although father says V.H. claimed this happened three years ago, we cannot find anything in the record to support that assertion. The only reference to time we have found indicates this also occurred when V.H. was seven.

We are not so sanguine. Except for her recanted claim, noted above, V.H. did not claim that father had inserted his finger or anything else in her vagina. Rather than assume father caused that injury, we will assume the possibility that V.H. has been sexually abused by more than one person.

The forensic evidence aside, the other evidence recounted above is sufficient to support the trial court's finding that father sexually abused V.H. and thus supports the trial court's jurisdiction finding under section 300, subdivision (d). Although there is evidence that V.H. is not always truthful, and tells stories to get out of trouble, there is also evidence that V.H. understood the difference between telling the truth and lying. We simply cannot say, as father urges, that V.H. is unreliable as a matter of law.

Father contends that even if the evidence supports the jurisdiction finding as to V.H., the circumstances do not support the trial court's jurisdiction findings regarding father's older daughter, C.T., and younger daughter, E.T., under section 300, subdivision (j), which states that a child may be adjudged a dependent child of the juvenile court if the child's sibling has been abused or neglected as defined in specified subdivisions, including section 300, subdivision (d), and "there is a substantial risk that the child will be abused or neglected," as defined in those other subdivisions.

As previously discussed, we will not address this claim because the trial court also found true with respect to both C.T. and E.T. the allegations under section 300, subdivision (b) that there is a substantial risk of harm to them as a result of father's alcohol abuse which interferes with his ability to provide adequate care for the children.

Father does not challenge the trial court's jurisdiction findings under subdivision (b) of section 300. Therefore, we will not address father's challenge to the section 300, subdivision (j) jurisdiction finding because even if we were to agree with him, we nevertheless would affirm the jurisdiction findings as to both E.T. and C.T. under section 300, subdivision (b).

C. Denial of Reunification Services

Father next contends the evidence is insufficient to support the trial court's order denying him reunification services under section 361.5, subdivision (b)(6), which states that the court need not provide reunification services to a parent when the court finds by clear and convincing evidence "[t]hat the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse . . . to the child, a sibling, or a half sibling by a parent . . . as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent. [¶] A finding of severe sexual abuse, for the purposes of this subdivision, may be based on, but is not limited to, sexual intercourse, or stimulation involving . . . the penetration or manipulation of the child's, sibling's, or half sibling's genital organs or rectum by any animate or inanimate object for the sexual gratification of the parent . . . ." Subdivision (k) of section 361.5 requires the court to "read into the record the basis for a finding of severe sexual abuse . . . under paragraph (6) of subdivision (b), and [also requires the court to] specify the factual findings used to

determine that the provision of reunification services to the offending parent . . . would not benefit the child."

Father does not challenge the sufficiency of the evidence to support the trial court's denial of reunification services. Instead, he contends that the trial court failed to make separate findings with respect to each child, and the evidence does not support a finding that C.T. would not benefit from reunification with father.

The trial court did not specify the facts it relied on to find that reunification services to father would not benefit the children, other than the fact of severe sexual abuse to V.H. (See § 361.5, subd. (i), which sets out six factors the court shall consider in determining whether reunification services will benefit the child pursuant to subd. (b)(6) and (7).) However, even if the trial court had set out the facts it relied on, the burden then would shift to father to show that reunification was in the best interest of C.T. (See subd. (c) of section 361.5, which states in pertinent part, "The court shall not order reunification for a parent . . . described in paragraph . . . (6) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.")

Father argued in the trial court that it would be in C.T.'s best interest to maintain a relationship with him because he has shown that he is "an acceptable parent to her." His attorney added, "We do believe [father] can provide a safe home for [C.T.]" Father's showing falls short of demonstrating that reunification with him is in the best interest of C.T. In determining a child's best interests under section 361.5, "[t]he juvenile court

should consider [and therefore the parent should demonstrate,] 'a parent's current efforts and fitness as well as the parent's history'; '[t]he gravity of the problem that led to the dependency'; the strength of the bonds between the child and the parent and between the child and the caretaker; and 'the child's need for stability and continuity.' [Citation.]" (*In re William B.* (2008) 163 Cal.App.4th 1220, 1228.)

Because father did not make the necessary showing, we must conclude the trial court acted in accordance with section 361.5, subdivision (c) in denying father reunification services with respect to each of the three children.

DISPOSITION

The disposition order is affirmed.

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MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.